SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.....

D. D. DENNIS, ET AL.,
Petitioners,

VS.

J. E. MABEE, ET AL.,
Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Previous Opinions

The opinion of the trial court is not officially reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which was rendered on December 10th, 1943, and rehearing denied on January 17th, 1944, is reported in 139 Fed. (2d) 941.

II.

Jurisdiction

The grounds of jurisdiction stated in the Petition which is printed with this brief under heading II will suffice and for the sake of brevity is not here reprinted.

III.

Statement of the Case

We here refer to the statement of the case made under heading I of the Petition. We desire to add, however, the following testimony:

The witness B. H. Clark, who was in charge for the defendant Halliburton Oil Well Cementing Company, testified that he might have made mention to bring the mud on faster to plaintiff and other Eubanks employees since Halliburton had to have the mud to keep the trucks running or shut down and wait on it and he asked that they carry the mud faster to keep the hopper full. (R., p. 154.)

Clark further testified that in order for Halliburton to perform their part of the job, that is, in order to kill the well, that, since "you have a great volume to overcome in the gas pressure coming from the well and you have to increase your volume and the only way you can do that is to increase the speed of your pumps and the dumping of the mud." (R., p. 155.) Clark further testified that this type of work calls for special training and special knowledge

in order to properly conduct it and that as a representative of the Halliburton Oil Well Cementing Company, he was a specialist in that kind of work. (R., p. 155.)

The witness Bob Wylder, foreman for the Mabee Company, whom the Circuit Court found as a matter of law "not only had the right of control and supervision, but actually exercised it," testified in part that:

> "Q. Did you give any orders out there to any of the men concerning how to unstack the mud?
>
> "A. No." (R., p. 262.)
>
> "Q. Did you give any orders at all concerning how the work was to be performed out there to anybody?
>
> "A. No. When the stack fell down I was in the car lying down." (R., p. 263.)

The witness Wylder further testified that he did not tell Halliburton's man, Clark, anything concerning taking over charge of the work, that Halliburton did take charge and control over their end of the work. (R., p. 264.)

The plaintiff, D. D. Dennis, testified that this was the first Baroid he ever had any dealings with, that he didn't know there was such stuff. (R., p. 78.) Dennis further testified that Eubanks picked him up and carried him to the job and when he arrived at the scene of the accident, the Baroid was already stacked. (R., pp. 80-81.) The plaintiff also testified that he never thought about any danger of the Baroid falling on him and that he would not have gone to

the center of the stack and have broken the stack had it not been for the order of Clark, Halliburton's foreman, as follows:

> "You men get it out of this one certain place where it was highest." (R., pp. 70-71.)

Dennis testified that prior to Clark's order they had been getting it off the end sacks. (R., p. 70.) Dennis testified that this was the first work he had ever done around a wild well (R., p. 72) and that he had been working 15 or 20 minutes before being injured. (R., p. 87.)

The evidence showed that Clark was rushing Dennis in the unstacking of the Baroid. (R., p. 88.)

Following the attempt of Dennis to break the stack in the middle in compliance with Clark's order, the stack immediately fell, injuring Dennis. (R., p. 71.) Dennis testified that on February 28, 1939, the date of his injury, he was working for Bill Eubanks. (R., p. 69.)

We have heretofore set out the evidence of the witness Mulkey to the effect that he was "experienced in the stacking and unstacking of mud; that, as an employee of John H. Marks, who hauled the mud to Mabee's premises and stacked same, that he was ordered by Wylder to stack the mud higher, after Wylder knew and observed that it was already stacked so high sacks were falling off of it" (R., p. 62); and that the sacks should have been cross-tied to prevent them from falling (R., p. 63), and that the effect of attempting to break such a stack in the middle as was ordered by Clark would be to cause it to fall. (R., p. 64.)

IV.

Specification of Errors

(a) The Circuit Court erred in affirming the District Court's judgment and erred in finding and holding that Dennis was as a matter of law an employee of the J. E. Mabee Company.

(b) The Circuit Court erred in affirming the judgment of the District Court and in finding and holding that:

> "The evidence is clear that Halliburton's contract was merely to operate the mixing machines and that Halliburton had no further duties in connection with the undertaking. Its four employees were merely operatives of the two machines and the evidence as to the giving of any directions by Clark or some other employee of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority. It is shown clearly that Halliburton had nothing to do with the stacking of the sacks nor with the direction and control of the Plaintiff. For aught that appears the gesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the stack as a matter of safety. At any rate, it clearly appears that Halliburton had nothing to do with the creation of the dangerous condition alleged. The motion for directed verdict as to Halliburton was properly sustained." (Opinion, pp. 4-5.)

(c) The Circuit Court erred in affirming the judgment of the District Court and in holding that the situation with reference to how the mud was stacked was patent and obvious, and in effect holding that Dennis was guilty of contributory negligence as a matter of law proximately causing his injuries and, based upon such reasoning, further holding that there was no negligence shown in failing to furnish Dennis a safe place in which to perform his duties while upon the premises of Mabee's, when under the undisputed evidence Dennis was inexperienced, knew nothing of his danger, and had only worked some 15 or 20 minutes when the stack fell as the result either of Clark's negligent order or of Wylder's act in creating, with knowledge, a dangerous condition on Mabee's premises by ordering the mud to be stacked at a dangerous height without being cross-tied, since the above evidence created fact issues for the jury as to negligence and contributory negligence of the parties plaintiff and defendant, as well as proximate cause.

V.

Summary of Argument

We shall contend that:

(1) Dennis was as a matter of law an employee of Bill Eubanks;

(2) In the alternative, we shall contend that if Dennis was not as a matter of law an employee of Bill Eubanks, then it was at least a question of fact as to whose employee Dennis was, whether he be

considered an employee of Eubanks or of Mabee; that in any event there is a common law liability on the part of the Halliburton Oil Well Cementing Company in this cause; and

(3) We shall submit that in the absence of facts charging Dennis with knowledge, consent or acquiescence, Bill Eubanks would be without authority to transfer him, even temporarily, into the employment of J. E. Mabee Company.

(4) That as to that portion of the opinion concerning Halliburton, the evidence clearly raised an issue of fact as to (a) whether Clark gave the order testified to by Dennis; (b) whether said order was given within the course of Clark's employment for Halliburton; and (c) whether the giving of said order constituted negligence, and (d) whether such negligence was a proximate cause of the accident.

A reading of the evidence set out in the Petition and Brief, together with the entire Record, demonstrates beyond the necessity of argument that the Fifth Circuit reached the fundamentally unsound conclusion expressed in the opinion based upon an erroneous interpretation of the evidence resulting in a decision involving important questions of law in such a way as to have departed from all the rulings of the Texas Courts thereon, as well as the great weight of authority everywhere.

Hence, this Honorable Court should grant this Writ under Rule 38(5)(b) as heretofore set out in order that justice and redress may be had by this seriously and permanently injured man, and in order that the law, in two of its most important domains,

Master and Servant, and Independent Contractor, may be clarified and preserved.

Summary

Point A. The Circuit Court erred in affirming the District Court's judgment and erred in finding and holding that Dennis was, as a matter of law, an employee of the J. E. Mabee Company.

Point B. The Circuit Court erred in affirming the judgment of the District Court and in finding and holding that:

> "The evidence is clear that Halliburton's contract was merely to operate the mixing machines and that Halliburton had no further duties in connection with the undertaking. Its four employees were mere operatives of the two machines and the evidence as to the giving of any directions by Clark or some other employee of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority. It is shown clearly that Halliburton had nothing to do with the stacking of the sacks nor with the direction and control of the Plaintiff. For aught that appears the gesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the stack as a matter of safety. At any rate, it clearly appears that Halliburton had nothing to do with the creation of the dangerous condition alleged. The motion for directed verdict as to Halliburton was properly sustained." (Opinion, pp. 4-5.)

Point C. The Circuit Court erred in affirming the judgment of the District Court and in holding that the situation with reference to how the mud was stacked was patent and obvious, and in effect holding that Dennis was guilty of contributory negligence as a matter of law proximately causing his injuries and, based upon such reasoning, further holding that there was no negligence shown in failing to furnish Dennis a safe place in which to perform his duties while upon the premises of Mabee's, when under the undisputed evidence Dennis was inexperienced, knew nothing of his danger, and had only worked some 15 or 20 minutes when the stack fell as the result either of Clark's negligent order or of Wylder's act in creating, with knowledge, a dangerous condition on Mabee's premises by ordering the mud to be stacked to a dangerous height without being cross-tied, since the above evidence created fact issues for the jury as to negligence and contributory negligence of the parties plaintiff and defendant, as well as proximate cause.

Argument

Point A (Restated). The Circuit Court erred in affirming the District Court's judgment and erred in finding and holding that Dennis was, as a matter of law, an employee of the J. E. Mabee Company.

In our opinion, the evidence in the case proves as a matter of law that D. D. Dennis was an employee of Bill Eubanks. It is uncontradicted that Bill Eubanks was an independent contractor, and as an independent contractor, Bob Wylder left up to him

the number of men for Eubanks to select and whom to select in the performance of Eubank's work for the J. E. Mabee Company, after advising him the type of job he wanted Eubanks to perform.

The evidence shows that Bill Eubanks, after he arrived on the scene, showed his employees how to form a circle and had them form a circle so that they would be able to perform their part of the work, which was the unstacking of the mud. Bill Eubanks says that he remained on the job for the purpose of giving orders to his men, but that after they started unstacking the mud, and had formed a circle there was no necessity of giving any further instructions since the men knew what to do.

G. E. Maxwell, one of Eubanks' crew, substantiates this statement by stating that he was taking orders from Eubanks and that Eubanks told his employees, and his crew, one of whom was Dennis, what their work would be before they arrived at the scene of the location.

Bob Wylder testified without dispute, that is the superintendent for Mabee, that he did not attempt to control any of the men in the performance of how to do the work, and the evidence further shows at the time that the accident occurred Wylder was asleep in the car.

The evidence further shows that Dennis had only been working some fifteen minutes under the very eyes of his employer and that the stack did not fall until one of Halliburton's men, to-wit: the foreman on the job, B. H. Clark, directed Dennis to break the stack in the middle.

In this written argument we shall contend that,

(1) Dennis was as a matter of law an employee of Bill Eubanks,

(2) In the alternative, we shall contend that if Dennis was not as a matter of law an employee of Bill Eubanks, then it was at least a question of fact as to whose employee he was, whose employee Dennis was, whether he be considered an employee of Eubanks or of Mabee, that in any event there is a common law liability on the part of the Halliburton Oil Well Cementing Company in this cause, and

(3) We shall submit that in the absence of fact charging Dennis with knowledge, consent or acquiesence, Bill Eubanks would be without authority to transfer him, even temporarily, into the employment of J. E. Mabee Company.

Our First Proposition to the effect that Dennis was an employee of Bill Eubanks as a matter of law will here be briefly discussed.

We shall not unduly lengthen this Argument by restating the facts. The test of the relationship existing between parties as to being employer and employee may be determined by two principal tests, namely:

A. Question of whether the reported employee is under the ultimate direction and control of the designated employer, that is, as to the method and details of the work, including the method of its performance and as to the terms, kind, character and results and the duration of such employment.

B. The ability to determine this relationship is whether the alleged employer has a right to hire and discharge, or the right to select such employees.

The Supreme Court of the State of Texas, in defining an employee, has held, in the case of *Shannon v. Western Indemnity Company*, 257 S. W. 552, as follows:

> "We think the term employee as used in this act may be said to have a broader and more liberal meaning than the word 'servant,' as that term has been generally understood, in this, that it was intended to include all those in the service of another whether engaged in the performance of manual labor, or in positions of management and trust, and whether being paid wages or a salary, so long as they remained under the *ultimate control of the employer*."

The phrase or term "ultimate control" has perhaps best been defined and considered in the general test of *Corpus Juris* as follows, Vol. 71, p. 421:

> "Although mere control has been held insufficient to render a hirer a master, in determining whether the relation of master and servant, or of employer and employee, exists, under a workmen's compensation act, the more frequently cited test, as disclosed by the authorities, is whether one party, as servant or employee, is within the direction, control, supervision, or orders of the other as master or employer, as to the details of the work and the means, manner, or method of its performance, and as to the terms, kind, character, results and duration of the employment. Control has been called the vital element, and the most significant in all

cases, and the right of control the final test. It has also been required that the employer have the responsibility for the work.

"The control has been required to be complete, authoritative, general, or ultimate, mere suggestion as to detail or supervision to see that the work is performed according to contract being insufficient; likewise, ultimate direction has been required."

Every case by the Fifth Circuit Court and every case by the Texas Courts up to the present date, including a statement defining the meaning of the term "employee" in *Texas Jurisprudence*, state that it has a different, more definite and more liberal meaning than exists at common law. In other words, the Courts say in all of the cases that in order to be an employee within the meaning of the Workmen's Compensation Act that there must first be a contract of hire, and second, one must be in the service of another.

As said in the case of *Peters v. United Studios*, 277 Pac. 156, the question is not who was Daum obeying, but who was Daum bound to obey? In the case at bar, there is no question but that Dennis was bound to obey Eubanks since Eubanks selected and hired men and had the right to discharge him and he was in the service of Eubanks and performing the services which Eubanks, as an independent contractor, had contracted to perform for Mabee, and Eubanks remained on the job to see that Dennis properly performed his work.

In the case of *Tilling v. The Indemnity Insurance Co. of North America*, 283 S. W. 565, in which a writ of error was denied, the records show that Tilling

was a detective under the general employment of the McCane Detective Agency and that a contract was entered into between the detective agency and the firm of Horton and Horton who furnished a clock and paper slips and required the night watchman to punch this clock at various hours during the night, which slips were later turned in to the said Horton and Horton.

While the said Tilling was watching the said property and in crossing the street from one portion thereof to another he was killed by an automobile and a suit instituted against the insurance company insuring Horton and Horton alleging that Tilling was an employee of said concern. The Court held that TILLING HAD NO PRIVITY OF CONTRACT WITH SAID HORTON AND HORTON and there existed no such relationship between Tilling and Horton and Horton as to make him an employee within the meaning of the said compensation act. That under the contract existing between the Detective Agency and Horton and Horton any watchman could have been furnished and that they did not disignate or particularly request Tilling as such watchman.

In the present case WYLDER NOT ONLY LEFT IT UP TO EUBANKS TO SELECT DENNIS BUT ALSO LEFT IT UP TO EUBANKS TO DETERMINE HOW MANY MEN TO SELECT TO PERFORM HIS PART OF THE CONTRACT. It is true that the contract between Bill Eubanks and Wylder is meager, but if Dennis was not an employee of Eubanks as a matter of law, then the fact that the contract was meager and vague and verbal in its terms would make it a question for the jury as to whose

employee Dennis was. It is a certainty that Eubanks thought that he had the right to control his own employees. They were his responsibility. He hired, selected, paid Dennis and carried compensation on him and REMAINED ON THE JOB FOR THE PURPOSE OF GIVING DENNIS ORDERS AND DID GIVE THE ONLY ORDER NECESSARY BY REQUIRING HIS MEN TO FORM IN A CIRCLE SO THAT THEY COULD PROPERLY PERFORM HIS PART OF THE CONTRACT OF UNSTACKING THE MUD.

If this is not a question of law ,then it is a question of fact, as is well stated in the Texas case of *Southern Underwriters vs. Willis*, 110 S. W. (2d) 252, in which the court said:

> "*The contract between Smith and said firm, under which deceased was working at the time of his death, was verbal and rather vague in its terms. The work to be done thereunder was the subject-matter thereof,* and was stated by the firm in the presence of both Smith and the deceased. Smith's assent thereto merely rendered certain the end to be accomplished. The means and methods to be used in accomplishing such end were, so far as disclosed by the testimony, left exclusively to the initiative of Smith or of the deceased, except it seems to have been understood by all parties that the use of a 'Hammer' in the connection was appropriate. *There is no testimony of any supervision by said firm of the work done by the deceased for the purpose of insuring that it conformed to the original contract or agreement, nor is there anything to indicate that any necessity for such supervision was contemplated.* See, in this connection, Shannon v. Western Indemnity Co. (Tex.

Com. App.), 257 S. W. 522; Traders & Gen. Ins. Co. v. Jones (Tex. Civ App.), 95 S. W. (2d) 189, 193, and authorities there cited; Carter Publication v. Davis (Tex. Civ. App.), 68 S. W. (2d) 640, 642, par. 1 (writ refused, and authorities there cited; Krausse v. Decker (Tex. Civ. App.), 57 S. W. (2d) 1124, 1125, par. 1.

"The trial court held that the testimony raised issues of fact with reference to whether the deceased was an employee of Smith at the time of his death, or an employee of said firm. He submitted such issues to the jury for determination. There is no complaint in this appeal of the manner of such submission. The jury found that he was the employee of Smith, and that he was not an employee of said firm. The actual employer, in legal contemplation, of the deceased, was a question of fact, unless the testimony bearing on such issue was not only uncontradicted, but was also so definite and conclusive that reasonable minds could not differ as to its effect. When the ultimate fact to be ascertained is not shown by direct testimony, but is to be inferred in whole or in part from other circumstances in evidence, a jury question is presented. Wallace v. Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399, par. 3; Krausse v. Decker (Tex. Civ. App.), 57 S. W. (2d) 1124, 1125, pars. 1 to 4; El Paso Laundry Co. v. Gonzales (Tex. Civ. App.), 36 S. W. (2d) 793, 795, par. 5; Straka v. Farmers' Mutual Protective Ass'n. (Tex. Civ. App.), 79 S. W. (2d) 883, 885, par. 1 (writ refused) and authorities there cited; Wiggins v. Holmes (Tex. Civ. App.), 39 S. W. (2d) 162, 163, pars. 1 to 3 inclusive (writ refused) and authorities there cited; Independence Indemnity Co. v. Kell (Tex. Civ. App.), 58 S. W. (2d) 1032, par, 2; Maryland Casualty Co. v. Williams (Tex. Civ. App.), 47 S. W. (2d) 858, 859, pars. 1 to 3, inclusive."

In the case of *Reynolds v. Hartford Accident and Indemnity Company*, reported in 107 Fed. (2d), a decision rendered by the Fifth Circuit Court, the only circumstance in this case was that Schrader had been furnishing men to perform labor for the Continental Oil Company. However, in the Reynolds case, Continental selected Reynolds, taught him how to do the details of his work and gave him his orders, and Schrader never came on the job and REYNOLDS THOUGHT HE WAS WORKING FOR CONTINENTAL AND THAT THEY WERE TO PAY HIS WAGES. But in spite of this, even in the Reynolds case, that Honorable Court held that it was a question for the jury to determine.

We think that decision correct since the question of who pays the wages has been held of considerable importance not only in that case but in the very well discussed case of *Manning v. Texas Employers Insurance Association*, 67 S. W. (2d) 389, and in many others.

WHILE THE RIGHT OF ULTIMATE CONTROL OF EMPLOYEE IS THE DECISIVE AND FINAL TEST WHAT BETTER EVIDENCE CAN THERE BE IN DETERMINING THIS QUESTION THAN THE QUESTION OF WHO PAYS THE WAGES, CARRIES COMPENSATION ON THE EMPLOYEE AND WHO HAS THE RIGHT TO DISCHARGE THE EMPLOYEE. If I pay a man and have the right to discharge him isn't that circumstance alone enough to prove that he is in my service under a contract of hire and is my employee within the meaning of the statutory definition of "employee" as laid down by the Workmen's Compensation Act of Texas? Do I pay one who is not ren-

dering service for me? Do I have the right to discharge one over whom I have relinquished the right of control? We say that these questions are unanswerable except to say that Dennis was doing the work of Eubanks, who selected him, paid his wages, retained control over him and had the right to discharge him. *We still earnestly insist that this case and the case of Hartford Accident and Indemnity Co. v. Addison by the Fifth Circuit Court, 93 Fed. (2d) 627, cannot reasonably be distinguished.*

Eubanks was certainly as much of an employer as was James in the case of *Manning v. Texas Employer's Ins. Co.*, 68 S. W. (2d) 389, in which the court said:

> "We think Manning at the time of his injury, was in the services of James; James was controlling his actions and paid him for his services; he could discharge or hire him, stop or direct his movement at will. Manning was the servant of James, obedient to his orders and subservient to promote the interest of his employer. * * *
>
> "The mere right of a person who has let out a contract to supervise the work in such a way as to see that it is performed according to contract, does not make the employees of the contractor his employees. * * *
>
> "Looking to all of the facts surrounding this transaction, we conclude that James, an independent contractor, was the employer of Manning, exercising the right of control over his employment, and directing his movement by such means and methods as he thought proper. In no sense of the term 'employee' was Manning employed by Dodd & Wedegartner; they did not hire him, paid him nothing for his services, and

were lacking in interest as to his action and movement, except to exercise the right of supervision of the work being done under their contract with James, seeing that the trucks were loaded and unloaded at specified places, as Dodd & Wedegartner had contracted with James."

The similarity between the case of *Manning v. Texas Employer's Insurance Co.* and the case at hand is marked. Whatever duty Manning owed Dodd & Wedegartner was by and through solely his duty to his employer, James, the independent contractor. Dodd & Wedegartner had only the right to accept such cooperation from Manning as they would have with the independent contractor, James, and no more.

In the case at bar, there was no lending of Dennis to Mabee, but Dennis was merely directed to perform certain work for Mabee by his employer Bill Eubanks; and Eubanks was paid for it. If Dennis was doing the work of Eubanks under Eubanks' supervision and control, it did not matter at whose request Dennis had been put to work or whose business Dennis' labor was furthering.

The following language from *Sherman and Redfield*, Sec. 225, we think, forcefully states the rule:

"Mere cooperation, or community of labor and ultimate purpose, is not enough to make men fellow servants. They are not fellow servants unless they are all under the control and direction of a common master. Therefore, when a servant works side-by-side with one employed by his master as an independent contractor, or with a servant of such contractor, or the serv-

ant of a contractor works with the servants of subcontractor or with the servants of another independent contractor, they are not fellow servants even though they help to do the same work for the benefit of the same ultimate employer and the master of either servant is therefore responsible for an injury caused by such servants' negligence in such work. AND THE MASTER OF EITHER SERVANT IS THEREFORE RESPONSIBLE FOR AN INJURY CAUSED BY SUCH SERVANT'S NEGLIGENCE IN SUCH WORK TO THE OTHER SERVANT."

This rule of law applies with full force not only to show that Dennis was an employee of Eubanks, but also shows liability on the part of the Halliburton Oil Well Cementing Company for the negligent order given by Clark. If there was anything vague or ambiguous about this order due to the awkward expressions of Dennis on the witness stand (which is understandable in an uneducated laboring man who sustained a back injury and fourteen (14) undisputed fractures of the femur, and had been in constant pain for more than three years), then certainly justice would require that this cause be reversed by this Honorable Court so as to make said evidence appear plainer in the record even though we say that under the rule in Texas, that requires that every legitimate inference be indulged in favor of the plaintiff's testimony on consideration of a motion for peremptory instruction, that the evidence was sufficient to raise a jury issue.

Dennis was subject to the directions and orders of Eubanks, according to the testimony of Eubanks,

who was there for that purpose and actually gave the only order necessary. Dennis received orders in the prosecution of the work from Clark of the Halliburton Oil Well Cementing Co. while Wylder of Mabee's remained asleep in the car and gave no orders under the testimony of Wylder which is undisputed in this record. But this did not operate to change Dennis' relation to Eubanks (*Johnson v. Netherlands Navigation Co.*, 132 N. Y. 576), the control and management and the power to discharge Dennis never passed from Eubanks to Mabee even for a moment.

There are special employee cases which, if the facts were different, would bring Dennis within the rule of quotation in the case of *Kilroy v. Canal Co.*, 121 N. Y. 22, from the case of *Murry v. Curry*, L. R. 6, C. P. 24:

> "If I lend my servant to a contractor who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed."

The New York Court of Appeals, however, drew the distinction between the case from which the quotation was taken and the one it was considering as follows:

> "To make that case fit the one before us, we must first determine that the stevedore in unloading the coal was entirely independent of the Captain, who had no right in any manner to interfere with the process of unloading; AND THEN WE MUST FURTHER FIND

THAT HE WAS EMPLOYED BY THE STEVEDORE AS HIS SERVANT TO DO THE WORK."

Under the decisions in Texas THERE CAN BE NO RELATION OF MASTER AND SERVANT UNLESS THE RIGHT TO SELECT AND DISCHARGE THE SERVANT EXISTS. Consequently Dennis was an employee of Eubanks since this right existed solely in Eubanks.

This rule is well stated in the case of *Dempster Mill Mfg. Co. v. Lester*, 131 S. W. (2d) 254 (error refused), the opinion being by Justice Alexander who is now Chief Justice of our Supreme Court. In that case Justice Alexander said:

> "In 39 C. J. 1269, the test for determining whether or not the relation of master and servant exists is laid down as follows:
>
> " 'When Relation Exists—Usual Tests for Determining—aa. In General. The relation of master and servant exists where the employer selects the workman, and may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance.'
>
> " 'Right to Select, Control and Discharge Servant. To constitute the relation of master and servant for the purpose of fixing liability on the former for acts of the latter under the doctrine of respondeat superior, it is indispensable that the right to select the person claimed to be a servant should exist. Furthermore, something more than the mere right of selection is essential to the relation. This right must be accompanied with the power and duty to con-

trol the alleged servant while in his employ; this, it is said, is one of the principal tests of the relation. If workmen do not stand in such relation to the person sought to be charged as to make it his duty to control them, they are not his servants and he is in no sense responsible for their acts under the doctrine of respondeat superior. * * *'

" 'Right to Discharge. It is also essential to the relation of master and servant that the right to remove for unskillfulness, neglect of duty, or other cause should exist.'

"Under the facts of this case as applied to the foregoing test Lester was clearly an empolyee of Works Progress Administration and not of the Dempster Mill Mfg. Co. The Works Progress Administration selected and employed Lester, paid him his wages, determined the hours he should work, the character of work he should do, and how and where he should do it, and had the exclusive right to discharge him. The mere fact that Dempster Mill Mfg. Co. furnished a supervisor to give instructions as to how the technical work should be performed in connection with the erection of the tower and tank did not render those who labored on the tower its employees. A like holding has been made under similar facts in numerous other cases. City of Waco v. Hurst, (Tex. Civ. App.) 131 S. W. (2d) 745, this day decided; Pittman v. City of Wichita Falls, (Tex. Civ. App.) 120 S. W. (2d) 847; Brooks v. City of Seattle, 193 Wash. 253, 74 Pac. (2d) 1008; City of Los Angeles v. Industrial Accident Commissoin, 9 Cal. (2d) 705, 72 Pac. (2d) 540; State ex rel. State Board of Charities v. Nevada Industrial Commission, 55 Nev. 343, 34 Pac. (2d) 408; Shelton v. City of Greenville, 169 Tenn. 366,

87 S. W. (2d) 1016; Hoover v. Independent School Dist., 220 Iowa 1364, 264 N. W. 611; Todaro v. City of Shreveport, (La. App.) 170 So. 356; Dabelstein v. City of Omaha, 132 Neb. 710, 273 N. W. 43; Ford v. Independent School Dist., 223 Iowa 795, 273 N. W. 870.

"This case does not come within the borrowed servant rule, so as to make Lester the servant of the defendant, as contended for by defendant, for the simple reason that the servant at the time of his injury was performing labor which the Works Progress Administration had obligated itself to do and was not performing work which Dempster Mill Mfg. Co. had obligated itself to do. In order for a laborer to come within the borrowed servant rule, he must be doing the work of the alleged borrower and not the work of the alleged lender. Jones v. George F. Getty Oil Co., 10 Cir., 92 Fed. (2d) 255; Higgins v. Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; City of Waco v. Hurst, (Tex. Civ. App.) 131 S. W. (2d) 745, this day decided. In the case at bar, the Works Progress Administration was to furnish all labor necessary to complete the project, including the erection of the tower and tank. As a safeguard, it was provided in the agreement between the school district and Dempster Mill Mfg. Co. that if, on account of the character of work requried to erect the tower and tank, the WPA laborers could not or would not do it, Dempster Mill Mfg. Co. was to furnish its own laborers to do the work, but that condition had not happened at the time the accident occurred.

"LESTER WAS STILL WORKING ON THE PROJECT UNDER HIS EMPLOYMENT WITH THE WORKS PROGRESS

ADMINISTRATION, DOING THE WORK WHICH THAT AGENCY HAD OBLIGATED ITSELF TO DO, AND THEREFORE REMAINED ITS EMPLOYEE AT ALL TIMES. In the case of Maryland Casualty Co. v. Donnelly, (Tex. Civ. App.) 50 S. W. (2d) 388, relied on by the defendant, Merriweather, the contractor was using the employee of Busby, the drayman, to do work which Merriweather had obligated himself to do. Consequently, we held therein that Merriweather had borrowed Donnelly, the servant of Busby, and was liable to him as his employer. The same is true of the cases of Judson & Little v. Tucker, (Tex. Civ. App.) 156 S. W. 225, and Texas Reciprocal Insurance Assn. v. Latham, (Tex. Civ. App.) 72 S. W. (2d) 648, cited and relied on by the defendant. No such condition existed in the case at bar. Consequently, we hold that Lester was not an employee of Dempster Mill Mfg. Co. at the time."

There can be no doubt but that Dennis at the time he was injured was doing the work which his employer had been doing as an independent contractor for the Mabee's for a number of months and which he had contracted to do on this occasion under the terms of the original contract, since it is undisputed that as an independent contractor EUBANKS WAS DOING ALL THE LEASE WORK FOR THE MABEE COMPANY AND IT IS TOO PLAIN FOR ARGUMENT THAT THE WORK IN QUESTION WAS DONE UNDER THE ORIGINAL CONTRACT AS WELL AS THE REQUEST OF WYLDER.

However, there is another and even more potent

reason why Dennis cannot be in any sense considered an employee of Mabee. In the case of *Younger Brothers v. Moore*, 135 S. W. (2d) 780, writ refused, the El Paso Court in an opinion by Chief Justice Price said in part as follows:

> "The relationship of employer and employee is contractual in its nature, 18 R. C. L., page 493, section 3."

On page 783, the Court further said:

> "The ex parte acts of a master cannot make his servant the servant of another. The ex parte acts of the servant while performing the work of his master cannot shift responsibility therefor to another."

In the case of *Linden Lumber Co. v. Johnson*, 128 S. W. (2d) 121 (writ denied), the Fort Worth Court of Civil Appeals stated in substance and quite plainly that the relation of master and servant was contractual and could not be forced upon another except by his consent, implied or expressed.

These late cases are merely a reiteration of the earlier Texas cases. In the case of *M. K. & T. Ry. Co. v. Ferch*, 36 S. W. 487, the Court said:

> "* * * On the other hand, there was testimony going to show that plaintiff was not aware of the existence of said construction company, and was not informed that they were going to work for such company; that this crew and machine would go where ordered by the officers of appellant, sometimes to work on other roads,

but always remaining in the employ of appellant; that he went with the machine crew and foreman to this work under orders of appellant's engineer; that when the work was completed they were ordered back by appellant. In brief, there was evidence that would sustain a finding that plaintiff did not know of or assent to any change of masters, but in doing this work was performing the customary service for which he was engaged by appellant, without any act of his own, or any circumstances, to indicate to him that he was serving any other person. While it cannot be doubted that if the machine and crew went into the independent service of the contractor and subject to its sole direction and control, with knowledge on the part of the crew of the change, appellant would be absolved from the duties that apply to the relation of master, still we think it equally clear that the employer cannot relegate his employee to the service of another, under circumstances that do not charge the employee with notice of any change, and thereby escape the obligations of master. The servant cannot be held to have ceased being such, where he is continued in his ordinary work, and no knowledge is imparted to him of any change in the relations between him and his employer. See Ward v. Fiber Co., (Mass.) 28 N. E. 300; Morgan v. Smith, (Mass.) 35 N. E. 101, citing Johnson v. Lindsay, App. Cas. 371; Railway Co. v. Dorsey, 66 Tex. 152, 18 S. W. 444."

The case of *Chicago, R. I. & G. R. R. Co. v. Trout*, 224 S. W. 472, on page 224 of said opinion, the Court said as follows:

"The second, third, seventh, eighth, twelfth and thirteenth assignments are based on the general contention that the evidence conclusively shows that the plaintiff was not, at the time of the injury, in the employ of the defendant, but was the servant of the Tucumcari & Memphis Railway Co. We overrule these assignments for the reason that the evidence is sufficient to warrant the finding that the contract of employment was between the Chicago, Rock Island & Gulf Railway Company and the plaintiff, and plaintiff did not consent or acquiesce in any substitution of the Tucumcari & Memphis Ry. Co. as his master, and there was nothing in the circumstances of his transfer to New Mexico to charge him, as a matter of law, with knowledge that there had been a change in his master. The relation of master and servant is the result of contract: if the master lends or hires his servant to another to work under such other party's direction, the servant may, during such service, become the servant of such other party if such arrangement is made with his consent or acquiescence; but if the servant is not informed of the change of masters, and there is nothing in the facts to charge him with such knowledge, then during such service he remains the servant of his original employer. M. K. & T. Ry. Co. v. Ferch, 36 S. W. 487; M. K. & T. Ry. Co. v. Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317; Texas Refining Co. v. Alexander, 202 S. W. 134; Hutt v. Philadelphia Ry. Co., 252 U. S. —, 40 Sup. Ct. 359, 64 L. Ed. —; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; Labatt on Master and Servant, (2d ed.) Sec. 52, p. 174; R. C. L., Vol. 18, pp. 493, 494."

In the case of *Zeigler v. Railway*, 62 Conn. 543, the Court said:

> "The Plaintiff was in the employ of the defendant, but the latter claimed immunity from liability for injuries to its employee on the ground that there was an agreement between it and another railway, over whose line its trains were run for parts of the distance, by which the employees of the defendant became the employees of the other road when the train passed onto the track of the latter. The claim was that the employee of the latter road, through whose negligence the injury was inflicted, was the fellow servant of the plaintiff. The Supreme Court of Connecticut said: 'No consideration of public policy will sustain this defense, because the public are not at all interested in the question, as they are in questions concerning innkeepers and common carriers. They are only interested to have the law justly and fairly administered. No considerations of justice will sustain it, because the plaintiff had no relation whatever to the negligent conductor. It was not his duty to observe his conduct. He had no opportunity to do so, and no opportunity to guard against the consequences of his negligence. We have shown that the defense can have no foundation in any contract to which plaintiff was a party, or which can justly affect him. If, therefore, the plaintiff may in any sense be regarded as in the service of the defendant, he is clearly without the reason of the rule, and therefore not within the rule itself. But he cannot in any proper sense be regarded as the servant of the defendant.'"

The Supreme Court of the United States in the case of *Hutt v. Philadelphia Railway Co.*, 252 U. S. 40, clearly implied that if it were necessary to hold the employee an employee of one other than his general employer, the question of whether he was knowingly transferred would be considered.

Based on public policy and as a matter of fairness and justice, we respectfully submit that the test, in determining whether or not the employee knowingly consented to the arrangement, is whether or not there are any facts charging him with knowledge that his employer has made him the servant of another and relinquished control over him. This proposition was not presented to the Texas Courts in the special employee cases cited by the Fifth Circuit Court such as the case of *Maryland Casualty Company v. Donnelly*, 50 S. W. (2d) 388, and *Jones & Little v. Tucker*, 156 S. W. 225.

The distinction in those cases is set out by Judge Alexander in the *Dempster case, supra.* Donnelly & Tucker had completed the work which their employers, as independent contractors, had contracted to perform, and then began a new job involving the work of a new master and involving a work which they had not been employed to do and was performed at the request of a new master. Consequently, they impliedly consented to become servants of a new master. That the doctrine that one cannot become a special employee without his expressed or implied consent is still the law of Texas, as expressed in the *Trout case, supra*, was recognized by the Ama-

rillo Court in the late case of *Traders & General Ins. Co. v. Woods*, 148 S. W. (2d) 975.

On motion for rehearing, the Court distinguishes the facts in that case from the facts in the *Trout case* but expressly recognizes the rule announced in the *Trout case.*

We say that there are no facts charging Dennis with consent, but if such is the case, *then the question of whether or not Dennis did consent was certainly a question of fact to be decided by the jury as stated in the Ferch case, supra.*

The case of *Standard Oil Co. v. Anderson*, 212 U. S. 480, by this Court, must control. In that case Anderson was hired by Torence, a master stevedore, and was working in his gang of longshoremen. Torence had contracted with the Standard Oil Co. to load its ship, Susquehanna, with oil. As a part of the contract the defendant oil company was to furnish a winchman and a man trained to handle the winch, for the purpose of hoisting the cases of oil from the dock to the ship and down to the hatch and hold. All of the work of loading was done by employees of Torence, the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant oil company. The winchman was required to work the same number of hours as the longshoremen, and he depended upon the signals from Torence and his men, that is, from the gangman under the employment of Torence, who stood upon the deck of the ship and gave signals to hoist or lower by means of blowing a whistle, and the winchman, in the general employment of the Standard Oil Company, obeyed these signals and

handled the winch of the defendant oil company under such directions as were given by the independent contractor, Torence, and his employees.

The case was tried to a jury, on the grounds of negligence of the winchman, and the jury held that the winchman was an employee of the defendant oil company and not of Torence, the stevedore.

This Court rendered its opinion that the courts below correctly held that the winchman remained the servant of the defendant oil company, and said:

> "Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking. * * *
>
> "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of the signals, under the circumstances of this case, was not the giving of orders, but of information; and the obedience to those signals show cooperation rather than subordination and is not enough to show that there has been a change of masters."

We might well ask "where is the evidence which gave Wylder the right to control employees selected by the independent contractor, Eubanks?" There certainly was an agreement between the two companies and under this agreement Eubanks thought

that he still had the right to control his employees and under the meager circumstances of this vague and verbal contract, the jury could have reached the same conclusion Eubanks did.

The Commission of Appeals of Texas, in an opinion adopted by the Supreme Court, affirmed the judgment of the Court of Civil Appeals with the following comment in the case of *Casualty Underwriters v. Rhone*, 132 S. W. (2d) 97:

> "The plaintiff in error, Casualty Underwriters, presents the contention that McDaniel had loaned his employee Rhone, to Beaumont Development Corporation, and that, therefore, during the few minutes in which he was engaged in removing this joist he was its employee. We approve the holding of the Court of Civil Appeals that this contention is not well taken. The fact that McCarter directed Rhone to remove this joist is of no particular significance. THE WORK WAS THAT OF RHONE'S EMPLOYER McDANIEL, AND IN PERFORMING SAME RHONE WAS WORKING FOR McDANIEL AND NOT FOR BEAUMONT DEVELOPMENT CORPORATION. THERE IS NO EVIDENCE THAT RHONE WAS LOANED. He was engaged in the performance of work which his employer had contracted to perform and was injured while so engaged. Whether or not McDaniel was entitled to extra compensation for removing this joist, or whether or not he had authorized McCarter to direct his employees, are collateral questions not affecting the case."

So it is with the case at bar. Reduced to its final analysis we have Bill Eubanks, who occupied the un-

questioned position of an independent contractor towards Mabee, Eubanks engaging, according to the Record in this case, in an independent business and occupation and hiring, selecting, discharging and controlling his own help. It cannot be argued that Eubanks occupied the position of an employee.

For instance, who ever heard of an employee having compensation insurance on a fellow servant? *The responsibility for all of the work performed by Eubanks' employees was Eubanks' responsibility, or else he would not have been requested by Mabee to carry Workmen's Compensation Insurance on the employees that he selected.* This carried with it the right of control in Eubanks. The work done here was done under the original contract, and on the morning in question, it appears without dispute that Wylder left it up to Eubanks to get what men and the number of men that Eubanks wanted to perform the specified job OF UNSTACKING THE MUD AND CARRYING IT TO THE HOPPER SO THAT MUD COULD BE PUMPED INTO THE WELL.

From the very inception of the agreement, we find Wylder leaving it up to Eubanks to hire and select his own crew. When Eubanks arrived on the scene, he showed his men how to form a circle so as to properly perform his contract of unstacking the mud. Wylder gave no orders. He was asleep in the car when the plaintiff was hurt. Eubanks remained on the job for the purpose of giving any necessary orders.

Had Eubanks directed his men to do whatever they were instructed to do by the Mabee Company, this would not have changed the relationship under the

cases hereinabove discussed such as the Addison case, supra, by this Honorable Court.

As is well said in the case of *Peters v. United Studios*, 277 Pac. 156:

> "A direction to do anything they wanted to take care of in Umsted v. Scoffield Engineering Construction Company, 263 P. 799 (Cal. Supp.), was held not necessary to indicate an intention by the general employer to surrender complete control of the employee."

This is especially true when in the unstacking of the mud, after Eubanks had shown the men how to form in a circle so as to pick up the mud, no further orders or supervision was necessary. This simply amounted to the cooperation and the giving of information as distinguished from ultimate and authoritative control as expressed in the Addison case. Notwithstanding this, the evidence appears that Eubanks told his men what to do before carrying them to the job and instructed them that they were to help unstack the mud. THE MERE CONCLUSION ON THE PART OF A LAYMAN, EITHER THE PLAINTIFF OR ANYONE ELSE, AS TO WHAT EUBANKS MEANT TO DO AND CONFLICTING TESTIMONY ABOUT WHAT EUBANKS DID DO CAN ONLY CREATE A QUESTION FOR THE JURY AS TO WHETHER EUBANKS ON THE OCCASION IN QUESTION HAD THE RIGHT OF ULTIMATE CONTROL OVER DENNIS.

The case of *Smith v. Styne and Lachman*, 25 N. Y. S. (2d) 628, very ably states the rule, when that court said:

"A servant lent or hired to another, by his master, does not become the 'servant' of the other merely because the other person directs what is to be done and how it is to be done, and if servant remains subject to general orders of man who has right to hire and fire him and follows his initial directions to perform certain services for another and is on his payroll, he is 'servant' of that master, even though that person for whom servant is performing some certain service controls servant to extent of instructing and directing him."

Point B (Restated). The Circuit Court erred in affirming the judgment of the District Court and in finding and holding that:

"The evidence is clear that Halliburton's contract was merely to operate the mixing machines and that Halliburton had no further duties in connection with the undertaking. Its four employees were mere operatives of the two machines and the evidence as to the giving of any directions by Clark or some other employee of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority. It is shown clearly that Halliburton had nothing to do with the stacking of the sacks nor with the direction and control of the Plaintiff. For aught that appears the gesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the stack as a matter of safety. At any rate, it clearly appears that Halliburton had nothing to do with the creation of the dangerous condition alleged. The motion for directed verdict as to Halli-

burton was properly sustained." (Opinion, pp. 4-5.)

Point C (Restated). The Circuit Court erred in affirming the judgment of the District Court and in holding that the situation with reference to how the mud was stacked was patent and obvious, and in effect holding that Dennis was guilty of contributory negligence as a matter of law proximately causing his injuries and, based upon such reasoning, further holding that there was no negligence shown in failing to furnish Dennis a safe place in which to perform his duties while upon the premises of Mabee's, when under the undisputed evidence Dennis was inexperienced, knew nothing of his danger, and had only worked some 15 or 20 minutes when the stack fell as the result either of Clark's negligent order or of Wylder's act in creating, with knowledge, a dangerous condition on Mabee's premises by ordering the mud to be stacked to a dangerous height without being cross-tied, since the above evidence created fact issues for the jury as to negligence and contributory negligence of the parties plaintiff and defendant, as well as proximate cause.

That the Fifth Circuit Court is mistaken as to the fact situation as well as law, is clearly shown by the following portion of the opinion: "The evidence is clear that Halliburton's contract was merely to operate the mixing machines and that Halliburton had no further duties in connection with the undertaking. Its four employees were mere operatives of the two machines and the evidence as to the giving of any directions by Clark or some other employee

of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority. It is shown clearly that Halliburton had nothing to do with the stacking of the sacks nor with the direction and control of the Plaintiff. For aught that appears the gesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the stack as a matter of safety. At any rate, it clearly appears that Halliburton had nothing to do with the creation of the dangerous condition alleged. The motion for directed verdict as to Halliburton was properly sustained." (Opinion, pp. 4-5.)

The most outstanding material statement indicating mistake on the part of the Fifth Circuit Court is the following statement: "For aught that appears the jesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the stack as a matter of safety." It was not Mr. Clark of Halliburton who made this motion, it was Mr. Wylder of Mabee.

The testimony of the witness George R. Smith supports our conclusion and the error of Mr. Justice Waller. We quote from Mr. Smith's testimony as follows:

> "Q. All right, what did you see Mr. Wylder do or hear him do?
>
> A. He motioned to start working those sacks off of the top down so they would not fall.
>
> Q. What was the motion that he made, did he make a motion with his hands?

A. Yes, he motioned over toward the center of the mud pile.

Q. You say the center of the mud pile. What do you mean, just what do you mean by the center of the mud pile, Mr. Smith?

A. The highest point.

Q. Who was he motioning to?

A. Some of the men working there.

* * *

Q. Your impression was that he was pointing to the center of the stack?

A. Yes.

Q. (Continuing) To keep it from falling, is that your impression?

A. He was pointing to the center of the stack and it would have been my impression that he was pointing to the center of the pile to work it down to keep it from falling.

Q. When Mr. Wylder was pointing over there, to whom was he directing his motions?

A. I did not think it was for any one individual. It was just a bunch of men." (Record, p. 159.)

The order given by Mr. Clark is set out in the statement. Another mistake, we respectfully submit, is this portion of the opinion, to-wit: "The evidence is clear that Halliburton's contract was merely to operate the mixing machines, and that Halliburton had no further duties in connection with the undertaking. Its four employees were mere operatives of the two machines and the evidence as to the giving of any directions by Clark or some other employee of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority." (Opinion, pp. 4-5.)

We have heretofore set out the evidence in our statement, showing that if the plaintiff Dennis' testimony was vague and uncertain, then the interest of justice demands that the cause be reversed and remanded so that the evidence might be more clearly developed, since it is understandable that a man with fourteen (14) undisputed fractures of the femur and in constant pain for more than three years, might be awkward in the giving of his testimony. However, we think this testimony clear enough to have raised a jury issue under the rule that all inferances and deductions must be indulged in favor of said testimony of the plaintiff.

We do not see, however, how Mr. Justice Waller can so narrowly confine Halliburton's rights and duties. We have heretofore set out evidence in our Statement showing that Wylder left Halliburton's part up to Halliburton. Halliburton's are specialists, and they were called out there for the expressed purpose of cementing a wild well. The testimony of Clark, who was in charge for Halliburton, is clear that in order to properly perform their part of the work, that mud had to be carried faster and dumped into the hopper, in order to kill the well; and that consequently, he requested Eubank's employees to BRING THE MUD FASTER IN ORDER THAT THE WELL MIGHT BE KILLED AND IN ORDER THAT HALLIBURTON MIGHT PROPERLY PERFORM THEIR PART OF THE JOB.

Clark denies ordering Dennis to break the stack in the middle, but Dennis testified plainly that Clark did order him to break the stack in the middle and

that had it not been for the order of Clark, that he would not have broken the stack in the middle. It appears without dispute that when Dennis attempted to break the stack in the middle, the stack then fell and not until then did it fall, inflicting permanent, serious, and totally and permanently disabling injuries on Dennis to such an extent as to render him an invalid dependent on the charity of mankind for the remainder of his life.

The opinion of the Fifth Circuit Court, reciting the fact that Halliburton had nothing to do with the stacking of the sacks nor with the direction or control of the Plaintiff, we respectfully submit, is not material.

WE HAVE A CASE HERE IN WHICH A STACK OF MUD IS DANGEROUSLY STACKED. IT IS HIGHEST IN THE MIDDLE. HALLIBURTON IS CALLED ON THE JOB FOR THE PURPOSE OF CEMENTING THE WELL. UNDER THE TESTIMONY OF CLARK IN ORDER TO DO THIS, THE STACK MUST BE UNSTACKED QUICKLY AND THE FASTER THE BETTER. HALLIBURTON'S PART OF THE JOB IS TO KILL THE WELL. THEY TAKE CHARGE AS EXPERTS WITHOUT DIRECTION FROM ANYBODY, HANDLING THEIR END OF THE JOB, ACCORDING TO THE TESTIMONY OF WYLDER, MABEE'S FOREMAN. UNDER SUCH CIRCUMSTANCES THEY INSTRUCT DENNIS TO BREAK THE STACK IN THE MIDDLE. UP TO THEN THE STACK HAD NOT FALLEN. FROM THE TESTIMONY OF THE WITNESS

SMITH, THE EFFECT OF THIS AND THE PURPOSE OF THIS ORDER WOULD BE TO KEEP THE STACK FROM FALLING, AND IT APPARENTLY WAS MADE FOR THIS PURPOSE BY CLARK. IT GOES WITHCUT SAYING THAT IF THE STACK HAD FALLEN CLARK COULD NOT PROPERLY PERFORM HIS DUTY OF CEMENTING AND KILLING THE WELL, SINCE THE MUD HAD TO BE PUT IN THERE IN A HURRY. THE COLLAPSE OF THE STACK WOULD NECESSITATE A SHUT-DOWN. CLARK'S ORDER WAS, THEREFORE, GIVEN WITHIN THE COURSE OF HIS APPARENT AUTHORITY, AND SINCE IT RESULTED IN INJURY, HIS SUPERIOR AND EMPLOYER, HALLIBURTON, IS LIABLE TO RESPOND TO DENNIS FOR DAMAGES.

It is quite true that the stack was already dangerously stacked at a dangerous height, and without being cross-tied so as to prevent the stack from falling. However, it is elementary law and a principle requiring no citation of authorities that THERE MAY BE MORE THAN ONE PROXIMATE CAUSE. UNDER THE CIRCUMSTANCES OF THE CASE AT BAR, WE RESPECTFULLY SUBMIT THAT IT WAS A QUESTION FOR THE JURY TO DETERMINE AS TO WHETHER THE STACK FELL DUE TO THE MANNER IN WHICH IT WAS STACKED OR WHETHER IT FELL DUE TO THE NEGLIGENT ORDER OF HALLIBURTON'S FOREMAN, CLARK, WHO INSTRUCT-

ED DENNIS TO BREAK IT IN THE MIDDLE.

It appears without contradiction that the stack did not fall until this order was given.

The witness, Mulkey, testified as an expert: THAT THE EFFECT OF BREAKING A STACK OF MUD, STACKED SUCH AS THIS WAS STACKED, (and Mulkey, as an employee of John H. Marks, helped stack the mud) WOULD BE TO CAUSE IT TO FALL.

It therefore was a question for the jury as to whether or not the order of Halliburton was the sole proximate cause of the stack falling, or whether it was a concurring proximate cause with the negligence of Mabee's. Wylder was very active in exercising control up to the time that the mud was stacked, since it appears without dispute that he made the employees of Marks, such as Mulkey, stack the mud higher, after it had already begun falling, and this was done over the protest of Mulkey and the employees of Marks.

We respectfully submit that to allow the opinion of Mr. Justice Waller to stand would be to invade the province of the jury as to proximate cause. That we are sure this Honorable Court is not going to do.

The law in Texas on this matter is quite clear. We quote from the case of *J. C. Penney Company v. Oberpriller*, 170 S. W. (2d) 607, in an opinion by the Commission of Appeals of Texas, adopted by the Supreme Court, in which the Court said (from page 609 of said opinion):

> "In determining whether an act is done in the course of the agency and by virtue of the

agent's authority given him by his principal, it should be determined whether the authority given was 'with a view to the principal's business.' 3 C. J. S. Agency, Sec. 255, p. 187. The authority just cited in elaborating upon the principle laid down, says: 'The tort of an agent is within the course of his employment where the agent is performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose; * * *' Justice Gaines in Illinois & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 1040, 27 Am. St. Rep. 902, says: 'To hold the master liable for the act of his servant, it is not necessary that the servant should have authority to do the particular act. The act of the servant may be contrary of his express orders, and yet the master may be liable. But the act must be done within the scope of the general authority of the servant. It must be done in furtherance of the master's business, and for the accomplishment of the object for which the servant is employed.'"

The case of *O'Shea v. Pacific Gas & Electric Company*, 62 Pac. (2d) 1066, is well in point. In that case the Court said:

> "Negligence of foremen of electric power company's substation in directing city fire chief to cut live wires in furtherance of foreman's duty to detach city's fire alarm bell from company's substation building and return it to chief rendered company liable for resulting injuries to chief. Master need not have specifically authorized servant's particular negligent act to be liable therefrom but such authority may be implied as incidental to and in furtherance of servant's work."

The opinion in the case of *Daugherty v. Spuck Iron & Foundry Co.*, 175 S. W. (2d) 45, is well in point. In that case the Court, on motion for rehearing, says (from p. 53 of said opinion):

> "In the case at bar, plaintiff certainly was not a trespasser upon his own truck. Plaintiff and his truck were upon defendant's premises by defendant's invitation. The loading of the truck was being done under the direct supervision of Rapsilber, defendant's foreman. He directed defendant's other employees in the hoisting and loading of the castings onto the truck and was defendant's representative in charge thereof. It was to the mutual advantage of plaintiff and defendant that the truck be properly loaded. Each had a direct interest in that operation. Plaintiff herein was not a mere 'outsider' in the matter of the loading of the truck, as defendant argues. In view of the evidence herein defendant's contention amounts to this: that Rapsilber had authority to direct plaintiff when and where to back and place his truck in the loading operation; that he had authority to direct the manner and the order in which it should be loaded with defendant's castings; that he was in charge of the loading operation for defendant; that he had authority to do all these things, but that his authority over the loading suddenly ceased and disappeared when he requested plaintiff to assist defendant's servant Jordan to 'walk' the lighter castings to the front of the truck to make room for other castings yet to be loaded, so as to complete defendant's work of loading the truck. We are unable to agree with that view. We *think that Rapsilber's authority to supervise for his principal and master the loading of the truck neces-*

sarily carried with it authority to do all things reasonably necessary to carry out that purpose to completion."

We, therefore, respectfully submit that Clark had the authority in order to promote his master's business, to give Dennis the order that he did give him; that said order was a negligent one, and that it was a question for the jury as to whether that order, followed by the act of Dennis, caused the stack of mud to fall.

There can be no doubt but that in Texas this created a common law liability, since under the decisions in the case of *Snelling v. Harper*, 137 S. W. (2d) 222, the rule is affirmed that the contractor owes to the employees of the other contractor the duty of executing his work with reasonable care for their safety.

There are many cases in 38 A. L. R. 471, substantiating this viewpoint. This rule of law was recognized in the case of *Herndon v. Halliburton Oil Well Cementing Company*, 154 S. W. (2d) 163, in which error was refused.

It is also recognized by the Fifth Circuit Court in *Southern S. S. Co. v. Meyners*, 110 F. (2d) 376.

Insofar as the question of contributory negligence is concerned, we would like to refer this Honorable Court to the Statement of Facts, together with the following question and answer of the Plaintiff Dennis:

"Q. And you had been out there for fifteen minutes, you think, to the time you got injured?
"A. Fifteen or twenty minutes." (Record, pp. 86-87.)

We have heretofore set out testimony in our Original Statement to the effect that Dennis did not realize his danger and AS A MATTER OF FACT NO ONE CAN ASSUME THAT THIS STACK WOULD EVER HAVE FALLEN HAD IT NOT BEEN FOR HALLIBURTON'S ORDER TO BREAK IT IN THE MIDDLE. Of course, insofar as Halliburton is concerned Dennis is entitled to recover whether he be considered an employee of Eubanks or of Mabee.

The Circuit Court, in its opinion, says that the stack was approximately 20 sacks in height and was open and obvious to all. This, in itself, does not convict plaintiff of contributory negligence. We respectfully submit that the question of plaintiff's contributory negligence, as well as all other questions in the case, were questions for the jury.

To begin with, it has been held in Texas that the Plaintiff assumed certain risks, but the doctrine of assumed risk and the doctrine of contributory negligence are distinct defenses. *Galveston H. & S. A. v. Contoyis*, 279 S. W. 929, certiorari denied, 274 U. S. 747.

The distinction between "contributory negligence" and "assumed risk" is that contributory negligence implies fault or breach of duty on the part of the injured servant, while assumption of risk is assumption by employee of risk of dangers known or obvious to him as incident to his employment. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 191 S. W. 579.

The Fifth Circuit Court has held in the case of *United Production Company v. Chesser*, 95 Fed.

(2d) 521, that the defense of assumption of risk was a defense that applied only where the relationship of master and servant existed. This doctrine has been substantiated in the recent case of *Herndon v. Halliburton Oil Well Cementing Co.*, 154 S. W. (2d) 163, error refused.

That Dennis is not guilty of contributory negligence as a matter of law is well shown by the following quotations from leading Texas authorities. In the case of *McAfee v. Travis Gas Corporation*, 153 S. W. (2d) 442, by the Supreme Court of Texas, in an opinion by Justice Critz, the Court says:

> "We interpret the opinion of the Court of Civil Appeals to hold that because McAfee went to the place this pipe line was leaking, with full knowledge of the facts, and with full knowledge that such leaking pipe was an object of danger, he was guilty of contributory negligence as a matter of law. We are unable to agree to such a conclusion. The mere fact that a person may expose himself to a danger will not preclude a recovery. In order to preclude a recovery the danger must be such that a person of ordinary prudence under like circumstances would not subject himself to it. 28 C. J. 598. THE MERE FACT THAT A PERSON MAY PARTICIPATE IN AN OPERATION ATTENDED BY SOME LATENT DANGER WILL NOT RENDER HIM GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. IT IS THE ESTABLISHED RULE IN THIS STATE THAT EVEN WHERE A PERSON HAS KNOWLEDGE, ACTUAL OR IMPUTED, OF A DEFECT, A QUESTION OF FACT AS TO NEGLIGENCE IS PRESENTED UNLESS

IT CAN BE SAID, AS A MATTER OF LAW, THAT A PERSON OF ORDINARY CARE WOULD NOT HAVE INCURRED THE RISK.

"Gulf C. & S. F. R. Co. v. Gascamp, 69 Tex. 545, 7 S. W. 227; Gulf C. & S. F. Ry. Co. v. Irick, Tex. Civ. App., 116 S. W. (2d) 1099; 30 Tex. Jr. p. 764, sec. 96; Northcutt v. Magnolia Petroleum Co., Tex. Civ. App. 90 S. W. (2d) 632, writ refused.

"In the Gascamp case, supra, the opinion is by Judge Gaines. The opinion discloses that the plaintiff was injured while crossing a bridge. The bridge was located upon a public road at a point where the road crossed the track of the railway company. It was the duty of the railway company to keep the bridge in repair. The bridge was in a bad state of repair and was dangerous to use. Plaintiff knew the dangerous condition of the bridge, but in spite of such knowledge attempted to cross it on horseback. A plank of the bridge, which was loose and rotten, became displaced and frightened plaintiff's horse. This caused plaintiff to be thrown onto the railway track, thereby inflicting on him serious injury. Plaintiff was on his way to town, and the bridge was on the only road he could get there on. The railway company contended that plaintiff was guilty of negligence, as a matter of law, in attempting to cross a bridge he knew was in a defective and dangerous condition. The jury acquitted the plaintiff of negligence. This Court, under the above facts, held that even though the plaintiff knew the bridge was in a dangerous condition, and that it was dangerous to cross it, still it was not negligence, as a matter of law, for him to risk such danger unless it could be further said that a person of ordinary prudence would not

have incurred the risk. We quote the rule as announced in the opinion (69 Tex. 545, 7 S. W. 228):

"'* * * According to the rule in this Court, in order that an act shall be deemed negligent, per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it. * * *'

"It is our opinion that the case at bar comes directly under the rule announced in the Gascamp case, supra. Certainly, if the operator of this gas pipe line had notice that it was leaking, under the facts above detailed, the jury was amply justified in finding negligence and proximate cause against it. Gas is a very dangerous substance. When a gas company has notice of a break in its pipe line, it must use due care and diligence to prevent the escape of gas therefrom. 21 Tex. Jr., pp. 11 to 15; McClure v. Hoopeston Gas & Elec. Co., 303 Ill. 89, 135 N. E. 43, 25 A. L. R. 250. See annotations 25 A. L. R. 262.

"Also under the facts detailed, the question as to the negligence of McAfee was a question for the jury. The mere fact that he knew about these leaks and knew that they constituted a dangerous condition would not, under the facts of this record, render his act of showing them to Joe Woods negligence as a matter of law."

While there are at least twenty Texas cases that we could discuss holding that the question of contributory negligence and proximate cause in cases where materials were negligently stacked and fell, were questions for the jury, we think it sufficient to cite the case of *Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082, in which the Court said:

"On December 24, 1912, he was ordered by Holland to stop the work of unloading and to go to work assisting the removing, retagging and loading certain sacks of meal from appellant's meal room into a car set for the purpose of being loaded; that some time prior thereto defendant, its foreman and employee, stacked a great number of sacks filled with cottonseed meal in its meal room in close proximity to the sacks which he was commanded to handle, and in doing so carelessly and negligently failed to tie or interlock said sacks in such manner as to insure the stacks standing against jars or shaking incidental to the running of the machinery therein; that the sacks weighed about 100 pounds each and were stacked one upon another to a great height, thereby rendering the same topheavy and liable to fall and dangerous to the life and limb of such employees of the company who were required to work in close proximity thereto; that the row of sacks nearest to where appellee was about to work were stacked with the ends towards his position, giving it the appearance of safety, and that he was ignorant of the true condition of the stack of sacks; that he was not informed of the danger attending the performance of the work to which he had been temporarily assigned; that the particular work he thus began to do was the lifting of sacks from the floor or from low stacks commencing but little above the place of the meal room and setting same at or near the door to retag, and which were taken away and loaded in the car by other hands. While thus engaged, and in a short time after beginning the work, and without knowledge on his part of danger and from causes unknown to him other than the negligent, careless, and in-

secure stacking above set out, a great number of sacks of meal fell from their high and insecure position and struck and bruised him, mashing him to the floor beneath their weight. It is alleged that the putting of the sacks in the stack, as above described, in the negligent manner in which they were placed was the direct and proximate cause of appellee's injuries, and that defendant, its foreman and employees, did not stack the said sacks as a person of ordinary prudence would have done under the same circumstances, and as was their duty to do, all of which was known to defendant, its foreman and employees, and could have been known, by the use of ordinary care and diligence, at the time and before the injury, and that they were negligent in failing to warn plaintiff of the danger in which he had been so suddenly placed by order of the foreman. The appellant denied negligence in the particulars alleged, and alleged that the plaintiff voluntarily engaged in the work and was not working at said time under the direction of defendant or any agent authorized or empowered to direct him to engage in such work; that his injuries were caused and due to his own negligence which contributed to said injuries, his negligence being due to his own carelessness in removing and loading the sacks of meal whereby he incurred danger not necessarily incident to the work in which he was engaged; that the sacks were visible to him and all the dangers incident to said sacks stacked as they were at said time were openly visible to him and he really knew or could have known of the danger incident to the work by the use of ordinary care; and that he is thereby deprived of any right of recovery.

"The first assignment attacks the finding of the jury because the finding that defendant did not provide plaintiff a safe place in which to work is against the undisputed evidence, which is to the effect that there is no danger in the place in which plaintiff was at work, and the only danger to which plaintiff was exposed was caused by his own carelessness and his negligent manner in doing the work; that he was not engaged in tagging and retagging the sacks of meal, but was pulling down sacks in a negilgent manner by pulling sacks from beneath instead of removing them from the top, which work he was doing voluntarily without instructions either as to doing or the manner in which he was to do the work from anyone, and with full knowledge of the danger to which he was exposing himself by the way he was removing said sacks of meal. Appellant submits this assignment as a proposition, and two other propositions are submitted thereunder: First, that plaintiff based his cause of action upon the negligence of defendant failing to stack the sacks in the meal room as an ordinarily prudent person would have done and upon no other ground. It was incumbent upon the plaintiff to establish the same by a preponderance of the evidence, and, if he failed, the court should not have submitted the issue to the jury. And, second, plaintiff could only recover upon the allegation of negligence alleged, and, if the evidence did not support same, it was error to submit a right of recovery upon any other ground, even if the evidence supported the other ground not alleged, and the court should have instructed a verdict for the defendant.

"The first issue submitted to the jury in effect is:

" 'Did defendant company, its foreman and employees, fail to stack the sacks with a view of avoiding injury, as an ordinarily prudent person would have done?'

"The jury answered this question in the affirmative. We are at a loss to understand what issue was here submitted that had no pleading to support it. The jury further found that the appellee was not guilty of contributory negligence, and further answered that the danger in handling the sacks was not open and visible, so that plaintiff could see or know of it, or, from the nature of the work, would reasonably acquire knowledge of such danger; and further that he did not voluntarily assume the risk. They also found that P. M. Holland, the foreman of the mill, instructed him to move the sacks and to work in the place where the sacks were being moved. The testimony of appellee and that introduced by him is to the effect that P. M. Holland, the foreman and manager of the mill, who had the authority to employ and discharge, directed the appellee to assist in tagging and retagging the sacks, and that, in obedience to such instructions, appellee left the work to which he had been assigned, and which he had theretofore been doing (that is, unloading cottonseed cake and carrying it into the mill or crusher to be ground into meal); that he went into the room where the meal was stacked to assist those engaged in tagging and retagging the sacks. In order to tag and retag the sacks, it was necessary to take the sacks from the stacks and place them so the old tags could be taken off and new ones put on, and, while he was removing the sacks, a stack of the sacks fell on him, covering him up, injuring his ankle, etc. His evidence is that he did not know

who had or how the stacks had been constructed previous to his going to work, and that no one warned him of the danger therefrom. He further testified that he thought he would be perfectly safe in getting the sacks, and if he had not so thought, he would not have gone in after the sacks. The evidence shows that sacks had been taken by others from the two tiers when appellee went into the room to work, and these two tiers extended about one-third the height of the stack at his side, or about six or seven high. It was out of these tiers that appellee commenced to remove the sacks, and he had been there but a short time when the stack fell over and caught him. He further states that the ends of the sacks next to those he was moving were towards him, and he did not think this tier would fall towards him, but that, if they fell, they would roll off to the side from him. From the evidence we do not find that he undermined the tiers of sacks next to the ones he was removing, but only took off the tier which adjoined the ones that fell. Up to the time of the injury he was not aware of the manner in which the stack had been constructed.

"It appears from the evidence that the back tier of the stack, next to the stack with the ends towards appellee, the sacks therein for several tiers were piled one upon the other, without being tied or interlocked, and that these tiers pushed out the tier next to appellee and toppled it over on him. At least the jury were authorized to find that the failure to tie or interlock the rear sacks caused them, by reason of their weight, to force over and tier, the ends of which were next to appellee, and, if they had been tied, the sacks would not have so fallen, and that they were negligently stacked.

It appears from the evidence that, after this accident, appellant caused stacks in the room to be tied or interlocked by persons then at work in that room. There is evidence to the effect that two weeks previous to the accident sacks so stacked had fallen in that room. There is evidence that in removing the sacks from the stack it was the rule at that mill, and the manager and foreman had so instructed the employees, to take the sacks down by tiers and leave the other tier with the straight wall of sacks. This, however, is denied, and there is evidence that the employees were instructed to commencing removing the sacks from the top. As a matter of fact, every issuable fact in this case was controverted and the testimony thereon is conflicting. The evidence in this case tends to show that appellee had not been at work in removing sacks for tagging exceeding 30 minutes when the accident occurred, and he says that he had only removed seven or eight sacks and pulled the tags off ready for retagging. The evidence shows that Holland, the superintendent, the day of the accident or the day after, told appellee that it was through appellant's carelessness that he was hurt, and that they would pay his doctor's bill, and for his time while confined, and that, if it had been his negligence, they would not do so. The evidence shows they did pay his doctor's bill, and for his time lost. We do not feel authorized, therefore, to say there was no fact which authorized the jury to find negligence, or in holding that the uncontroverted facts show that appellee was guilty of contributory negligence, and that he assumed the risk.

"As usual in cases of this character, there is a perfect wilderness of contradiction and con-

flicting testimony, but on that ground alone we do not feel justified in holding the verdict is without support. We do not think that it can be said, as a matter of law, that an inexperienced man, relying upon the assumption that the master knows his duty to the employees, and will perform it, would have known the manner of doing the work was not a reasonably safe one. We do not think within the 30 minutes' work that he acquired such knowledge as to apprise him of the danger he encountered in continuing the work. These questions, we think, were for the jury, and, having passed upon the facts, we do not believe we should disturb their findings. Bonnet v. Railway Co., 89 Tex. 72, 33 S. W. 334. There is evidence at least tending to support the findings of the jury. The same may be said as to contributory negligence. The appellee is not shown to have conducted himself out of the usual and ordinary way of performing the work, and the testimony is that the method of reducing the pile of sacks was resorted to in the instant case that had theretofore been used and directed. True, some of the witnesses say it would have been better and safer to take the sacks from the top, but at least the question for the jury to say whether an ordinarily prudent man would have acted as did appellee under the circumstances."

In addition to the above, in order for contributory negligence to bar a recovery in Texas, the jury must find that said contributory negligence was the proximate cause of the plaintiff's injuries, and this in itself was a question of fact for the jury, particularly under the evidence that Dennis would not have broken the stack in the middle had it not

been for the order of Halliburton. Together with this, contributory negligence is no defence where the issue of discovered peril is raised; and said issue is here raised.

Conclusion and Prayer

The case of *McGrath vs. Pennsylvania Sugar Co.*, 127 Atl. Rep. 780, by the Supreme Court of Pennsylvania, is a case squarely in point with the fact situation of the case at bar, the only difference being that in the *McGrath case*, sugar was being stacked, and in this case, it was mud. For the purpose of brevity, we refer this Honorable Court to that decision which in itself fully demonstrates the right of the plaintiff to recover as against each of the defendants herein, and demonstrates the great unsoundness of the conclusion reached by the Fifth Circuit's new judge, Justice Waller.

WHEREFORE, Your Petitioners respectfully pray this Honorable Court to grant the petition for a Writ of Certiorari, to the end that on review the Circuit Court may be directed to reverse its judgment.

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A true and correct copy of this Petition for Certiorari and Brief in support thereof has been furnished counsel for each of the adverse parties.

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